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40 CFR Ch. I (7–1–00 Edition)

action in an appropriate Federal district court to obtain the records.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§2.113 Initial denials of requests.

(a) An initial denial of a request may be issued only for the following reasons:

(1) A statutory provision, provision of this part, or court order requires that the information not be disclosed;

(2) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b) and EPA has decided that the public interest would not be served by disclosure; or

(3) Section 2.204(d)(1) requires initial denial because a third person must be consulted in connection with a business confidentiality claim.

(b) The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations. This authority may be redelegated; *Provided*, That the authority to issue initial denials of requests for existing, located records (other than denials based solely on §2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.

(c) [Reserved]

(d)(1) Each initial determination to deny a request shall be written, signed, and dated, and, except as provided in paragraph (d)(2), shall contain a reference to the Request Identification Number, shall identify the records that are being withheld (individually, or, if the denial covers a large number of similar records, by described category), and shall state the basis for denial for each record or category of records being withheld.

(2) No initial determination shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the initial determination shall

state that the request is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b). No such determination shall be made without the concurrence of the General Counsel or his designee. The General Counsel has designated the Contracts and Information Law Branch to act on these requests for concurrence. See §2.121 for guidance on initial determinations denying, in limited circumstances, the existence of certain law enforcement records or information.

(e) If the decision to deny a request is made by an authorized EPA employee other than the person signing the determination letter, that other person's identity and position shall be stated in the determination letter.

(f) Each initial determination which denies, in whole or in part, a request for one or more existing, located EPA records (including determinations described in §2.113(d)(2) of this section) shall state that the requester may appeal the initial denial by sending a written appeal to the address shown in §2.106(a) within 30 days after receipt of the determination. An initial determination which only denies the existence of records, however, will not include a notice of appeal rights.

(g) A determination shall be deemed issued on the date the determination letter is placed in EPA mailing channels for first class mailing to the requestor, delivered to the U.S. Postal Service for mailing, or personally delivered to the requestor, whichever date first occurs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985; 53 FR 216, Jan. 5, 1988]

§2.114 Appeals from initial denials; manner of making.

(a) Any person whose request for one or more existing, located EPA records has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in §2.106(a).

(b) An appeal should be mailed no later than 30 calendar days after the date the requestor received the initial determination on the request. An untimely appeal may be treated either as a timely appeal or as a new request, at

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the option of the Freedom of Information Officer.

(c) The appeal letter shall contain a reference to the Request Identification Number (RIN), the date of the initial determination, and the name and address of the person who issued the initial denial. The appeal letter shall also indicate which of the records to which access was denied are the subjects of the appeal.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§2.115 Appeal determinations; by whom made.

(a) The General Counsel shall make one of the following legal determinations in connection with every appeal from the initial denial of a request for an existing, located record:

- (1) The record must be disclosed;
- (2) The record must not be disclosed, because a statute or a provision of this part so requires; or
- (3) The record is exempt from mandatory disclosure but legally may be disclosed as a matter of Agency discretion.

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is exempt from mandatory disclosure but legally may be disclosed, and the record has not been disclosed by EPA under 5 U.S.C. 552, the matter shall be referred to the Assistant Administrator for External Affairs. If the Assistant Administrator determines that the public interest would not be served by disclosure, a determination denying the appeal shall be issued by the General Counsel. If the Assistant Administrator determines that the public interest would be served by disclosure, the record shall be disclosed unless the Administrator (upon a review of the matter requested by the appropriate Assistant Administrator, Associate Administrator, Regional Administrator, the General Counsel, or the head of a headquarters staff office) determines that the public interest would not be served by disclosure, in which case the General Counsel shall issue a determination denying the appeal. This review by the Assistant Administrator for External Affairs shall not apply to appeals from initial deter-

minations by the Office of Inspector General to deny requests.

(c) The General Counsel may delegate his authority under paragraph (a) of this section to a Regional Counsel, or to any other attorney employed on a full-time basis by EPA, in connection with any category of appeals or any individual appeal.

(d) The Assistant Administrator for External Affairs may delegate the authority under paragraph (b) of this section to the Deputy Assistant Administrator for External Affairs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§2.116 Contents of determination denying appeal.

(a) Except as provided in paragraph (b) of this section, each determination denying an appeal from an initial denial shall be in writing, shall state which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record, and shall state the reason(s) for denial of the appeal. A denial determination shall also state the name and position of each EPA officer or employee who directed that the appeal be denied. Such a determination shall further state that the person whose request was denied may obtain de novo judicial review of the denial by complaint filed with the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the Agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

(b) No determination denying an appeal shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the determination shall state that the appeal is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b).

[53 FR 217, Jan. 5, 1988]